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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 841

LOCAL 553, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SAMUEL J. COHEN
Counsel for Petitioner
Office and P. O. Address
50 East 42nd Street
New York 17, New York

JACK LAST,
BENJAMIN M. SHIEBER,
Of Counsel

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Coal, Gasoline, Fuel Oil Teamsters, Chauffeurs, Helpers, Oil Burner Installation, Maintenance, Service Men and Helpers of New York City and Vicinity, Nassau and Suffolk Counties, New York, N.Y., Local Union Union No. 553, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on December 27, 1960.

Opinions Below

The opinion of the court below on the petition for enforcement of an order of the National Labor Relations Board (Appendix D, *infra*, pp. D-1–D-6) is reported at 284 F. 2d 861, and the opinion on the denial of the petition for rehearing (Appendix E, *infra*, p. E-1) is not yet officially reported. The findings of fact, conclusions of law and order of the National Labor Relations Board (Appendix to Petitioner's Brief in the United States Court of Appeals for the Second Circuit, B.A. 38-51*) are reported at 125 N.L.R.B. 454.

Jurisdiction

A judgment of the Court of Appeals was entered on the petition for enforcement of an order of the National Labor Relations Board on December 13, 1960 (Appendix B, *infra*, pp. B-1–B-2). On December 19, 1960, it was withdrawn pending disposition of a petition for rehearing. On December 27, 1960, the petition for rehearing was denied and the judgment of the Court of Appeals was entered (Appendix C, *infra*, pp. C-1–C-7). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether it is an unfair labor practice by an employer under Section 8(a)(1) and 8(a)(3) and by a union under Section 8(b)(1)(A) and 8(b)(2) of

* References to that portion of the record printed as an appendix to petitioner's brief in the Court of Appeals are designated "B.A." Whenever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

the National Labor Relations Act to agree to reduce an employee's seniority on the basis of a good faith, mistaken interpretation of a collective bargaining agreement unrelated to the employee's union membership or failure to perform a union obligation.

2. Whether an employer and a union can be found to have committed unfair labor practices under Sections 8(a)(3) and 8(b)(2) of the National Labor Relations Act, respectively, when there is no evidence proving that the employer's motive was to encourage or discourage union membership and the employer's conduct does not inherently have the effect of encouraging or discouraging union membership.

Statute Involved

The pertinent provisions of the National Labor Relations Act (61 Stat. 136, as amended, 29 U.S.C. §151, *et seq.*) are set forth in Appendix A, *infra*, pages A-1–A-3.

Statement

Miranda Fuel Co., Inc., hereinafter called the "Employer", is a New York corporation engaged in the business of selling and distributing coal, heating fuel oil and related products. For a number of years, Local 553, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter called the "Union", has represented the Employer's truck drivers and entered into collective bargaining agreements with the Employer covering the terms and conditions of employment of the truck drivers (B.A. 33-4, 70-71).

Since the business of the Company is selling heating oil, the volume of business and employment depends on the season of the year, and generally are at a low point between the months of April and October, the so-called "slack season."

The collective bargaining agreement involved in this proceeding was effective for the period January 1, 1956 to December 31, 1957. It contained provisions relating to seniority and leaves of absence which were specifically designed to meet the unique requirements of the Employer and its employees occasioned by the seasonal nature of the Employer's business.

The specific provision of the agreement designed to meet these requirements is found in Section 8. It provided:

"Section 8: . . .

"It is further understood and agreed upon that—during the dull season of the year, preference shall be given to the fuel oil chauffeurs on the seniority list, and that the Shop Steward shall be the No. 1 fuel chauffeur on the list.

"During the slack season, April 15 to October 15, any employee who according to seniority would not have steady employment shall be entitled to a leave of absence and maintain his full seniority rights during that period. Any man so described must report to the Shop Steward not later than 8 A.M. on October 15 and sign the seniority roster in order to protect his seniority, and the Employer agrees to accept the certification of said Shop Steward as to availability of such men when called by the Employer. If

October 15 falls on a Saturday or Sunday, the reporting day shall be the next work day. Any man failing to report as above specified shall forfeit all seniority rights." (B.A. 70-71).

In April, 1957, Michael Lopuch, a truck driver employed by the Employer and a member in good standing of the Union requested permission from the Employer's president for a leave of absence (B.A. 40, 55; 5, 24, 25). Mr. Lopuch asked that his leave commence at the end of the working day of April 12, 1957 and informed the Employer that he expected to return to work about October 15, 1957. The Employer granted Mr. Lopuch's request for a leave of absence to begin at the end of the working day of April 12, 1957, and Mr. Lopuch took a leave of absence beginning at that time. Because of illness, Mr. Lopuch was unable to report for work on October 15, 1957 and therefore failed to sign the seniority roster on that date (B.A. 40-41, 55; 6-7, 27). Mr. Lopuch notified the Employer that he would be unable to report for work until he recovered from his illness, and he returned to his job on October 30, 1957 (B.A. 40, 55-56; 26, 31).

Before taking his leave of absence Mr. Lopuch was No. 11 on the Employer's seniority list. On his return, the Union, upon the urging of other employees, insisted that Mr. Lopuch's position on the seniority list should be reduced to No. 21, the then bottom of the list. (B.A. 41, 56; 8-9, 10-12, 18-21, 27-29, 35). This resulted in the loss of some Saturday employment for Mr. Lopuch (B.A. 56; 28-29).

Initially, the Union's position was that Mr. Lopuch's seniority should be reduced because he had not signed the seniority roster on October 15, 1957, as explicitly

required by Section 8 of the collective bargaining agreement (B.A. 40-41, 56-57; 8-9, 18-21, 27-32). When Mr. Lopuch verified that his reason for not reporting for work on October 15, 1957 was illness, the Union stated that Mr. Lopuch's seniority should nevertheless be reduced because he had started his leave of absence before April 15, 1957, the date fixed by Section 8 of the contract as the beginning of the "slack season" (B.A. 41, 56-57; 9-12, 21-22).

That the Union's position was based solely on its interpretation of the collective bargaining agreement and that this interpretation was concurred in by the Employer are not disputed (B.A. 10-12). Thus, the Trial Examiner found in the intermediate report, in a finding adopted by the National Labor Relations Board, hereinafter called the "Board":

> "The uncontroverted testimony establishes that the Union, in demanding that Lopuch be reduced in seniority, relied on Section 8 of the contract, at first because he had not reported to the Shop Steward and signed in on October 15, 1957, and thereafter, after his illness had been verified, because he had gone on leave of absence status before April 15, 1957. The Company, in reluctantly agreeing to comply with the Union's demand for Lopuch's demotion in seniority, likewise did so because it believed that the said contract provisions left it no alternative, even though the Company had granted Lopuch permission to go on leave status when he did" (B.A. 56-57).

Thus, the sole basis for the Union's insistence on the reduction in Mr. Lopuch's seniority and the Employer's acquiescence in that reduction was their joint

interpretation of the requirements of the collective bargaining agreement (B.A. 56-57, 39-40).

There is no evidence whatsoever that the action of the Employer and the Union in agreeing to reduce Mr. Lopuch's seniority was in any way related to Mr. Lopuch's union membership or failure to perform a union obligation, or that either the Employer or the Union was motivated by a desire to encourage or discourage union membership.

On May 27, 1958, a complaint issued alleging that the Employer and the Union had engaged in unfair labor practices in violation of Sections 8(a)(1) and (3) and 8(b)(1)(A) and (2) of the National Labor Relations Act. On the basis of the facts stated above, a Trial Examiner found that unfair labor practices in violation of these sections had been engaged in by both the Employer and the Union.

After considering exceptions filed by the Union and the General Counsel, the Board adopted the findings, conclusions, and recommendations of the trial examiner with certain additions and modifications. The Board held that Section 8 of the collective bargaining agreement unlawfully delegated to the Union exclusive control over the seniority status of the Employer's drivers (B.A. 39). And, as an alternative ground for its decision, the Board held that Section 8

> "was not by its terms applicable to Lopuch's situation, and thus the reduction of his seniority, though accomplished under the guise of contractual agreement, was nevertheless not the result of the Union's performance of a purely ministerial act, but in fact was effectuated through

> concession by the Company to a position taken by the Union which, although purportedly in reliance on the contractual provisions, nevertheless was outside the scope of the parties' agreement and within the field of seniority generally. As the contract clearly did not cover Lopuch's situation, we find that it cannot serve as a defense to the discrimination inherent in the reduction of Lopuch's seniority." (B.A. 39-40).

The Court of Appeals for the Second Circuit, on a petition for enforcement filed by the Board, held that the contract provision did not constitute an unlawful delegation of control over seniority to the Union, citing its decision in *Local 553, I.B.T.* v. *NLRB*, 266 F. 2d 552 (2nd Cir. 1959) which involved a substantially identical agreement. But the Court granted enforcement of the Board's order on the alternative ground relied on by the Board. The court held that

> "it is clear that Section 8, by its terms, compels a loss of seniority only for failure to return promptly, not for an early departure taken with the permission of the employer. . . . Accordingly, we are compelled to conclude that Section 8 of the agreement did not justify any forfeiture of Lopuch's seniority rights; and the action taken in conflict with the agreement constituted a delegation of power over seniority rights which improperly encouraged union membership and discriminated against the employee Lopuch." (Appendix D, *infra*, pp. D-4–D-5).

The Union petitioned for rehearing and the Court of Appeals denied the petition and entered a decree which, *inter alia*, enjoined the Employer and the

Union from giving effect to any arrangement or understanding "not in accordance with the collective bargaining agreement between the parties which reduces the seniority of Michael Lopuch. . . ." (Appendix C, *infra*, pp. C-2, C-5).

Reasons for Granting the Writ

The decision below fails to follow the applicable principles of law enunciated by the Court in *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953) and *Radio Officers' Union* v. *NLRB*, 347 U.S. 17 (1954). In the *Huffman* case the Court held that it was within the power of a collective bargaining representative under the National Labor Relations Act to agree to give employees with less length of service with their employer a higher seniority rank than employees with greater length of service. In that case, the Court said:

> ". . . Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." 345 U.S. at p. 338.

And the Court made it clear that as long as the collective bargaining representative acted within the

limits of its authority, it could not be found to have committed an unfair labor practice. It said:

> ". . . Our decision interprets the statutory authority of a collective bargaining representative to have such breadth that it removes all ground for a substantial charge that International, by exceeding its authority, committed an unfair labor practice. . . ." 345 U.S. at p. 332, n. 4.

The Court's decision in the *Radio Officer's* case in the following year did not constitute a limitation on the ruling in the *Huffman* case. The two cases complement each other as interpretations of the scope of a collective bargaining agent's authority under the National Labor Relations Act.

In *Radio Officer's* the Court held that under Section 8(b)(2) of the Act it is an unfair labor practice for a collective bargaining agent to cause an employer to engage in discriminatory action for the purpose of encouraging union membership or "to encourage members to perform obligations or supposed obligations of membership." See 347 U.S. at p. 52. The Court stated that:

> ". . . The policy of the Act is to insulate employees' jobs from their organizational rights. Thus §§8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood. . . . No other discrimination [than under a valid union security contract] aimed at encouraging employees to join,

retain membership, or stay in good standing in a union is condoned." See *Radio Officer's Union* v. *NLRB*, 347 U.S. 17, 40-42 (1954).

Stated in terms of the *Huffman* case, *Radio Officer's* stands for the proposition that a collective bargaining agent will not be considered to have exercised its discretion in "complete good faith and honesty of purpose . . ." when it engages in conduct that is violative of Section 8(b)(2) of the National Labor Relations Act. See 345 U.S. at p. 338.

But the Court held that "only such discrimination as encourages or discourages membership in a labor organization is proscribed" and that the "motivation of the employer" was relevant in determining whether there had been a violation of Section 8(a)(3) of the Act. See *Radio Officer's Union* v. *NLRB*, 347 U.S. 17, 43 (1954). The Court specifically rejected the contention of the Board "that employers' motives are irrelevant under §8(a)(3). . . ." See 347 U.S. at p. 45; *Supplemental Brief for the National Labor Relations Board on Reargument*, pp. 5-13, *Radio Officer's Union* v. *NLRB*, 347 U.S. 17 (1954). It held that in order to sustain a finding of a violation of Section 8(a)(3) and a concomitant violation of Section 8(b)(2) evidence proving that the employer's motive was to encourage or discourage union membership was required except in those cases "where employer conduct inherently encourages or discourages union membership. . . ." See 347 U.S. at p. 45. Discriminatory conduct related to an employee's union membership or lack thereof or to this failure to perform a union obligation was held to be conduct that inherently encourages union membership.

In the instant case it is undisputed that both the Union and the Employer relied on Section 8 of the agreement as the basis for reducing Mr. Lopuch's seniority (See B.A. 56-57). There was no evidence that this reliance was anything other than a good faith interpretation of the agreement. Nor was there any evidence that the reduction in seniority was occasioned by Mr. Lopuch's union membership or failure to preform a union obligation or was in any way intended to encourage union membership.

On the basis of a finding that this good faith interpretation of the agreement was "clearly" incorrect, the Board and the Court of Appeals held that the Employer and the Union had violated Sections 8(a)(3) and 8(b)(2), respectively. Thus, the decisions of the Board and the Court of Appeals are authority for the proposition that the reduction of an employee's seniority, or, indeed any action adversely affecting an employee, based on a good faith interpretation of a collective bargaining agreement unrelated to the employee's union membership or failure to perform a union obligation is an unfair labor practice, if the Board should later find that the interpretation was "clearly" incorrect.

The decisions below result in an unwarranted limitation on the authority of collective bargaining agents. Day to day interpretation of the agreement is one of the primary functions of a collective bargaining agent. Interpretation may be coincidental to determining whether to ask that an employee's seniority rank be reduced or raised, or it may be coincidental to determining whether to process to arbitration any of the countless grievances filed by employees, ranging from improper discharge to failure to grant a coffee break.

A union's interpretation of the agreement may lead it to ask for a reduction of an employee's seniority, or an improvement of an employee's seniority (with the consequent reduction of the seniority of other employees), or not to process a grievance. In all of these situations, one or more members of the bargaining unit will be disadvantaged as a result of the collective bargaining agent's interpretation of the agreement. Under the decisions of the Board and the Court of Appeals in the instant case, in each of these situations the collective bargaining agent may be found to have engaged in an unfair labor practice solely because its interpretation is later found to have been incorrect.*

That the holdings below hobble the collective bargaining agent in its ability to perform one of its important functions is clear. That they do so in a manner that is not warranted by the National Labor Relations Act as interpreted by this Court and other courts seems equally clear. As shown, the Court in *Radio Officers* held that Section 8(a)(3) and 8(b)(2) condemned as unfair labor practices,

> "discrimination [other than under a valid union security contract] aimed at encouraging employees to join, retain membership, or stay in good standing in a union. . . ." 347 U.S. at p. 42.

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* The fact that the Court of Appeals and the National Labor Relations Board based their decisions on a finding that the interpretation of the collective bargaining agreement was "clearly" incorrect is not of practical significance. "What one man considers frivolous another may find meritorious . . . ." especially when the initial interpretation of collective bargaining agreements, generally performed by laymen, a union business representative and a businessman, will be reviewed by lawyers to determine whether it was "clearly" incorrect. See *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564, 568 n. 6 (1960).

And the Court held that the "aim" must be proved by evidence that the employer's discriminatory conduct was motivated by an intent to encourage or discourage union membership. The Court said that

> "specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership . . . where a natural consequence of his action was such encouragement or discouragement. . . ." See 347 U.S. at p. 45.

But where the employer's conduct is not of this nature, specific proof of intent is required.

In the instant case there was no specific proof of intent on the part of either the Employer or the Union to encourage union membership. Nor was there any proof that the reduction of Mr. Lopuch's seniority was in any way related to his union membership or his failure to perform a union obligation. Cf. *Radio Officers' Union* v. *NLRB*, 347 U.S. 17 (1954); *NLRB* v. *IAM, Lodge 727*, 279 F. 2d 761 (9th Cir.), *cert. denied*, 364 U.S. 890 (1960); *NLRB* v. *Oklahoma City General Drivers, Local 886*, 235 F. 2d 105 (10th Cir. 1956); and *NLRB* v. *IBT, Local No. 41*, 225 F. 2d 343 (8th Cir. 1955). Indeed, the evidence showed that Mr. Lopuch was a union member in good standing and did not show that he was in any way deficient in his performance of union obligations.

Thus, the sole basis for the decisions below is the fact that the Union's interpretation of the collective bargaining agreement, concurred in by the Employer, was found to have been "clearly" incorrect. It is submitted that this does not constitute a sufficient ground for a finding that the Union and the Employer engaged in unfair labor practices in violation of the

National Labor Relations Act. The decisions below do not advance

> "(t)he policy of the Act . . . to insulate employees' jobs from their organizational rights . . . to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood. . . ." See *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 40 (1954).

Rather, they constitute a severe limitation, unsupported by any valid public policy, on the "wide range of reasonableness [that] must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." See *Huffman* v. *Ford Motor Co.*, 345 U.S. 330, 338 (1953).

In the interest of a sound national labor relations policy this Court should review the decision below to overturn a gross misinterpretation of the National Labor Relations Act adopted in that decision.

Conclusion

For the foregoing reasons it is respectfully urged that this Court issue its writ of certiorari to review the decision below.

SAMUEL J. COHEN
Counsel for Petitioner
Office and P. O. Address
50 East 42nd Street
New York 17, New York

JACK LAST,
BENJAMIN M. SHIEBER,
Of Counsel

Appendix A

The relevant provisions of the National Labor Relations Act (61 Stat. 136, as amended, 29 U.S.C. §151, *et seq.*) as of 1957, the time that the alleged unfair labor practices were engaged in, are as follows:

"RIGHTS OF EMPLOYEES

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

"UNFAIR LABOR PRACTICES

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any

other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made . . ., and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. . . ."

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 26232

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

MIRANDA FUEL CO., INC., AND LOCAL 553, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

DECREE

Before: SWAN, CLARK and MEDINA, *Circuit Judges.*

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against Respondent Miranda Fuel Co., Inc., its officers, agents, successors and assigns; and Respondent Local 553, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, representatives, agents, successors and assigns on November 30, 1959. The Court heard argument of respective counsel on November 2, 1960, and has considered the briefs and transcript of record filed in this cause. On November 28, 1960, the Court, being

fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Second Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Miranda Fuel Co., Inc., its officers, agents, successors and assigns; and Local 553, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, representatives, agents, successors and assigns, abide by and perform the direction of the Board in said order contained.

THOMAS W. SWAN
Judge, United States Court of Appeals
for the Second Circuit

HAROLD R. MEDINA
Judge, United States Court of Appeals
for the Second Circuit

Filed: December 13, 1960

A true copy.

A. DANIEL FUSARO
Clerk

Appendix C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 26232

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

MIRANDA FUEL CO., INC., AND LOCAL 553, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

DECREE

Before: SWAN, CLARK and MEDINA, *Circuit Judges*.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against Respondent Miranda Fuel Co., Inc., its officers, agents, successors and assigns; and Respondent Local 553, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, representatives, agents, successors and assigns on November 30, 1959. The Court heard argument of respective counsel on November 2, 1960, and has considered the briefs and transcript of record filed in this cause. On November 28, 1960, the Court, being

fully advised in the premises, handed down its decision granting enforcement of the Board's order with the limitation that

> "paragraphs A(1)(a) and B(1)(A) of the order referring to *any* 'arrangement or understanding' which delegates to the Union exclusive control over seniority, do not refer to or include section 8 of the present collective bargaining agreement, but rather designate the oral and superseding understanding reducing Lopuch's seniority which the Board found upon evidence we think adequate."

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Second Circuit that:

A. The Respondent Miranda Fuel Co., Inc., New York, New York, its officers, agents, successors and assigns, shall;

1. Cease and desist from:

(a) Maintaining, performing or giving effect to any arrangement or understanding not in accordance with the collective bargaining agreement between the parties which reduces the seniority of Michael Lopuch;

(b) Encouraging membership in, or activities on behalf of, the Respondent Union, by refusing employment to Michael Lopuch, or to any of its employees, or by reducing the seniority of Michael Lopuch, or of any of its employees, pursuant to a request of the Union not in accordance with the collective bargain-

ing agreement between the parties, or by discriminating against them in any like or related manner in regard to their hire or tenure of employment, or any other term or condition of employment;

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Restore Michael Lopuch to his former position of #11 on the drivers' seniority roster or to such other position to which he may be entitled together with all the rights pertaining to that position;

(b) Preserve and make available to the Board and its agents, upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back pay due and the rights of employment and seniority under the terms of this Order;

(c) Post at its premises at New York, New York, copies of the notice attached hereto as Appendix A. Copies of said notice, to be fur-

nished by the Regional Director for the Second Region, shall, after being duly signed by an authorized representative of the Company, be posted by the Company immediately upon receipt thereof and be maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to insure that said notices are not altered, defaced, or covered by any other material;

(d) Post at the same places and under the same conditions as set forth in (c) above, as soon as they are forwarded by the Regional Director, copies of the Respondent Union's notice attached hereto as Appendix B.

(e) Mail to the Regional Director for the Second Region signed copies of the notice attached hereto as "Appendix A" for posting by Respondent Local 553, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, at its business offices and meeting halls, including all places where notices to members are customarily posted. Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by an authorized representative of the Company, be forthwith returned to the Regional Director for such posting;

(f) Notify the Regional Director for the Second Region, in writing, within ten (10) days from the date of this Order as to what steps it has taken to comply herewith.

B. Respondent Local 553, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, representatives, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Maintaining, performing, or giving effect to any arrangement or understanding with the Miranda Fuel Co., Inc., not in accordance with the collective bargaining agreement between the parties, which reduces the seniority of Michael Lopuch;

(b) Causing or attempting to cause the Respondent Company to discriminate against Michael Lopuch, or any other employee, by means of any conduct on the part of Respondent Company which would be proscribed by paragraph A(1)(b) of this Order;

(c) In any like or related manner, restraining or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Notify Michael Lopuch and the Respondent Company that it has no objection to the restoration of said Michael Lopuch to position #11 on the Company drivers' seniority roster,

or to such other position to which the said Michael Lopuch may be entitled, together with the rights pertaining to that position;

(b) Post at its business offices and meeting halls in New York, New York, copies of the notice attached hereto as Appendix B. Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by an authorized representative of the Respondent Union be posted by it immediately upon receipt thereof and be maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material;

(c) Post at the same places and under the same conditions as set forth in (b) above, as soon as they are forwarded by the Regional Director, copies of the Respondent Company's notice attached hereto as "Appendix A";

(d) Mail to the Regional Director for the Second Region signed copies of the notice attached hereto as Appendix B for posting by Miranda Fuel Co., Inc., at its premises in New York, New York, in places where notices to employees are customarily posted. Copies of the notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by an authorized representative of the Respondent Union, be forthwith returned to the Regional Director for such posting;

(c) Notify the Regional Director for the Second Region, in writing, within ten (10) days from the date of this Order as to what steps it has taken to comply herewith.

C. Respondent Miranda Fuel Co., Inc., its officers, agents, successors, and assigns, and Respondent Local 553, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, representatives, agents, successors and assigns, shall jointly and severally make Michael Lopuch whole for any loss of pay he may have suffered because of the discrimination against him.

THOMAS W. SWAN
Judge, United States Court of Appeals for the Second Circuit

CHARLES E. CLARK
Judge, United States Court of Appeals for the Second Circuit

.....
Judge, United States Court of Appeals for the Second Circuit

Filed: 27 Dec. 1960

A true copy:

A. DANIEL FUSARO
Clerk

[Notices omitted]

Appendix D

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Decided November 28, 1960

Docket No. 26232

Before:

SWAN, CLARK and MEDINA,

Circuit Judges.

On petition for enforcement of an order of the National Labor Relations Board.

The National Labor Relations Board petitions for enforcement of an order, 125 NLRB No. 53, against respondents Miranda Fuel Co., Inc., and Local 553, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Enforcement granted.

HERMAN M. LEVY, Atty., National Labor Relations Board, Washington, D. C. (Stuart Rothman, Gen. Counsel, Dominick L. Manoli, Asso. Gen. Counsel, Marcel Mallet-Prevost, Asst. Gen. Counsel, and Melvin J. Welles, Atty., National Labor Relations Board, Washington, D. C., on the brief), *for petitioner.*

JACK LAST, New York City (Stanley B. Blumberg, of Cohen and Weiss, New York City, on the brief), *for respondent Local 553, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.*

CLARK, *Circuit Judge:*

The National Labor Relations Board petitions for enforcement of an order enjoining respondents Miranda Fuel Co., Inc., and Local 553, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, from giving effect to any arrangement which delegates to the Union exclusive control over the seniority status of the Company's employees. The order further directs the Company to restore Michael Lopuch, an employee and a member of the respondent Union, to the seniority position of which he had been deprived at the request of the Union. The Board has found that the Company, by acquiescing in the Union's insistence that Lopuch lose his seniority, violated §§8(a)(3) and (1) of the National Labor Relations Act, as amended, 29 U. S. C. §§158(a)(3) and (1), and that the Union violated §§8(b)(1)(A) and (2) of the Act, as amended, 29 U. S. C. §§158(b)(1)(A) and (2).

Lopuch's loss of seniority arose in the following manner. In April 1957, Lopuch had been employed as a truck driver by the Company, a seller of fuel oil, for approximately eight or nine years. He then enjoyed the eleventh position on a seniority list of approximately twenty-one. About the beginning of April 1957, Lopuch spoke to Jerry and Fred Miranda, chief

officers of the Company, and told them he wished to spend the summer in Ohio and do some work for his sister-in-law, whose husband had just died. The period from April 15 to October 15 was a slack season in the fuel oil business, and was so designated in section 8 of the collective bargaining agreement between the Union and the Company, quoted below. Lopuch obtained permission to leave at the close of business on Friday, April 12, 1957. He told his employers he would return by October 12. In mid-October, however, Lopuch got sick, and he did not return to work until October 30. The illness was evidenced by a doctor's certificate, and the late return was excused by the Company.

Shortly after his return, the Union, at the urging of various of its members, demanded that the Company reduce Lopuch to the foot of the seniority list, on the ground that his late return violated section 8 of the collective bargaining agreement. The relevant portion of that section provides:

> "During the slack season, April 15 to October 15, any employee who according to seniority would not have steady employment shall be entitled to a leave of absence and maintain his full seniority rights during that period. Any man so described must report to the Shop Steward not later than 8 A.M. on October 15 and sign the seniority roster in order to protect his seniority, and the Employer agrees to accept the certification of said Shop Steward as to availability of such men when called by the Employer. If October 15 falls on a Saturday or Sunday, the reporting day shall be the next work day. Any man failing to report as above specified shall forfeit all seniority rights."

When the Union discovered that Lopuch's failure to return to work on time was because of an excused illness, it abandoned the claim that he be dropped from seniority because of a late return to work. Instead, it insisted that he be reduced in seniority because he had left work before April 15. Jerry Miranda, who did not think that Lopuch's early departure would cause any loss of seniority when he gave permission to leave on April 12, was reluctant to agree to this request. But in matters affecting seniority, Miranda let the Union decide "the difference between right and wrong." Accordingly, Miranda acquiesced in the Union's demand that Lopuch be dropped to the bottom of the seniority list.

We agree with the Board's conclusion that Lopuch, in leaving work three days early with the employer's permission, did not lose seniority rights under section 8 of the collective bargaining agreement. The Board found that Lopuch would have had steady employment during the slack season if he had not obtained his leave of absence. Therefore, the Board concluded that the leave of absence could not be regarded as taken under section 8, which assures the right to such leave only for employees who would not have steady employment. Whether or not this interpretation is correct, it is clear that section 8, by its terms, compels a loss of seniority only for failure to return promptly, not for an early departure taken with the permission of the employer. Since, as the Union points out, these strict deadlines are for the purpose of assuring the employer an adequate labor force when needed, a three days' leeway in the date of departure ought certainly to be available in the discretion of the employer. Accordingly, we are compelled to conclude that section 8 of the agreement did not justify any forfeiture of

Lopuch's seniority rights, and the action taken in conflict with the agreement constituted a delegation of power over seniority rights which improperly encouraged union membership and discriminated against the employee Lopuch.

We find it necessary to emphasize that the action taken was against and not under the agreement lest there be confusion as to the existing law as we feel called upon to apply it. In *Local 553, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* v. *N. L. R. B.*, 2 Cir., 266 F. 2d 552, we held a substantially identical agreement valid and refused to enforce the Board's order in *Meenan Oil Co., Inc.*, 121 N. L. R. B. No. 71. We held that provisions for seniority stated in a collective bargaining agreement and depending on objective criteria, whose application involved merely administrative or ministerial functions on the part of the shop steward, did not give improper authority to a union to encourage union membership or to discriminate against individual employees. And we reiterated this holding in our decision in *N. L. R. B.* v. *News Syndicate Co.*, 2 Cir., 279 F. 2d 323, 329-330, certiorari granted Nov. 7, 1960, pointing to the arbitration clause there (and here) present as reinforcing the view that no exclusive authority over seniority was given the Union. But in its decision in the present case the Board, while finding the facts we accept as the basis of decision, went on to say that it adhered to its *Meenan* holding and concluded again that the section 8 provisions unlawfully delegated exclusive control over seniority rights to the Union. We think our decisions correctly interpret the law, and until or unless the Supreme Court bids otherwise they must stand. Accordingly it

must be understood that paragraphs A(1)(a) and B(1)(a) of the order, referring to *any* "arrangement or understanding" which delegates to the Union exclusive control over seniority, do not refer to or include section 8 of the present collective bargaining agreement, but rather designate the oral and superseding understanding reducing Lopuch's seniority which the Board found upon evidence we think adequate.

Enforcement granted.

Appendix E

OPINION OF THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Before SWAN, CLARK and MEDINA, *Circuit Judges.*

On Petition for Rehearing.

PER CURIAM:

The petition for rehearing is denied. It is based on the argument that discrimination in regard to seniority cannot encourage union membership where the victim was a union member in good standing. The answer to this argument is that a demonstrated ability of the union to control seniority tends to encourage union membership, even though the demonstration is conducted with a union member as victim.

T.W.S.
C.E.G.
U.S.C. JJ.

27 Dec 1960